

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs October 24, 2006

**STATE OF TENNESSEE v. RAYMOND O. LONG, JR.**

**Direct Appeal from the Criminal Court for Davidson County  
No. 2004-B-1804 Steve Dozier, Judge**

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**No. M2005-02960-CCA-R3-CD - Filed February 23, 2007**

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The defendant, Raymond O. Long, Jr., was convicted by a Davidson County jury of first and second degree murder. He was sentenced to life imprisonment for the first degree murder conviction and thirty-two years for the second degree murder conviction to be served consecutively. On appeal, he argues that the trial court erred: (1) in not allowing a complete jury voir dire; (2) in allowing testimony regarding his conduct toward the victim in violation of the rule against hearsay and Tennessee Rule of Evidence 404(b); (3) in excluding a videotape of a witness's prior inconsistent statement; (4) in not acting as thirteenth juror because the jury verdict was against the weight of the evidence; and (5) in its sentencing determination. Upon our review of the record and the parties' briefs, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed**

J.C. McLIN, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

Edward S. Ryan, Nashville, Tennessee, for the appellant, Raymond O. Long, Jr.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Katrin N. Miller and Christopher Buford, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

**I. BACKGROUND**

On June 22, 2004, the defendant was indicted for two counts of first degree murder arising out of the December 23, 2003, killing of his ex-girlfriend, Falon Glaze,<sup>1</sup> and Falon's new boyfriend, Terrance Scruggs. A jury trial was conducted September 19th and 20th, 2005, from which we summarize the following testimony relevant to the issues on appeal.

Etasha Ford, Falon's cousin and good friend, testified that the defendant and Falon were in a dating relationship for approximately five years before Falon broke up with the defendant in October 2003 and started dating Mr. Scruggs. On the night of December 23, 2003, Ms. Ford was supposed to take Falon to Wal-Mart because Falon's car tires were flat. Ms. Ford called Falon at 11:30 p.m. and told Falon to be waiting for her. Mr. Scruggs was at Falon's apartment at the time. Ms. Ford arrived at Falon's apartment at midnight and "[p]olice and ambulance and fire department [were] everywhere. And . . . they were bringing Terrance [Scruggs] out on a stretcher."

Ms. Ford recalled an incident in April 2003 when Falon called her frantically screaming that the defendant had just tried to kill her by running her car off the road. Ms. Ford later saw Falon's car and noted that the car looked like it had been sideswiped on the driver's side. Ms. Ford also recalled an incident that occurred about a week before Falon's death when Falon called Ms. Ford and told her that the defendant had "just tried to kill [her]. He just put a knife up to [her] neck and said that [he was] gonna kill [her], Terrance, and . . . everybody that's [at her grandmother's house]." On cross-examination, Ms. Ford could not recall whether she told the officers at the scene about the two incidents involving the defendant because she was hysterical at the time. Ms. Ford admitted that she was not present when either of the alleged incidents occurred.

Officer Matthew Atnip with the Metropolitan Nashville Police Department testified that he arrived at Falon's apartment and noticed that the door had been "busted" off the jamb. Officer Atnip saw an unconscious female lying on the floor in the den and a wounded, but conscious male in the bedroom. Officer Atnip interviewed the residents of nearby apartments, but no one saw what happened.

On cross-examination, Officer Atnip noted that the female victim was lying on the floor with her feet facing the door, but she was far enough away from the door for the door to open and close. Officer Atnip stated that the apartment door was closed when he arrived, so he had to open it before he could enter the apartment. Officer Atnip recalled that the male victim was still on the phone with 911 when he arrived, but he did not know whether anyone questioned the male victim about who had shot him. When shown a photograph of the doorway into the apartment, Officer Atnip identified a shell casing in the middle of the door frame. Officer Atnip recalled that the neighbor across the hall from Falon reported seeing or hearing "one person running down the steps." Officer Atnip stated that he was called to the scene right before midnight.

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<sup>1</sup> Because victim Falon Glaze has the same last name as Magan Glaze, one of the witnesses at trial, we will refer to both women by first name only.

Metropolitan Nashville Police Officer Burl Eddy Johnson, Jr., testified that he received a call to report to Falon's apartment at 11:48 p.m. When he arrived, several officers were already on the scene, and he noted that the apartment door appeared to have been forced open or kicked in and pieces of the door jamb were on the living room floor. Officer Johnson identified a picture of a shell casing standing on end in the doorway, and another picture of a shell casing found outside of the apartment to the left of the doorway. Officer Johnson was sure the casings were not disturbed prior to being photographed. On cross-examination, Officer Johnson noted that when an automatic weapon is fired the shell will eject straight down or behind the shooter.

Calvin Miles testified that on December 23, 2003, the defendant and Joseph Whitfield, as well as some other friends, were at his house playing video games. The defendant arrived around 10:00 p.m. and had been drinking. Mr. Miles recalled seeing the defendant talk to Mr. Whitfield and Darian Spencer at some point that night. The defendant left around 11:00 p.m. followed by Mr. Whitfield about ten minutes later. Mr. Miles said that the defendant called around 10:00 the next morning looking for Mr. Whitfield, but he said that he did not know Mr. Whitfield's whereabouts.

Mr. Miles stated that he did not know Falon Glaze, but he knew that the defendant had a girlfriend with whom he was having problems. One time in the past, Mr. Miles witnessed a telephone argument between the defendant and Falon, but the defendant "took the conversation on the porch" because he was being loud. On cross-examination, Mr. Miles stated that he had no independent knowledge of what happened at Falon's apartment the night of December 23, 2003.

Joseph Whitfield testified that he knew the defendant for a couple of months prior to the incident in this case. Mr. Whitfield saw the defendant on December 23, 2003, at Mr. Miles' house, and the defendant "was asking everybody would we go somewhere with him." Mr. Whitfield eventually agreed to go with the defendant, but the defendant did not tell him where they were going. They left Mr. Miles' house sometime late in the evening and drove on Interstate-24 until they parked on the side of the interstate behind Murfreesboro Road. The defendant led the way through a hole in a fence, up a hill, and across a parking lot into an apartment complex.

Mr. Whitfield testified that the defendant led the way to a third-floor apartment, had Mr. Whitfield knock on the door, and when no one answered, the defendant "made his way in." Mr. Whitfield explained that the defendant broke the apartment door open with his body. Once the defendant was inside the apartment, Mr. Whitfield heard a shot, a pause, and then another shot. Mr. Whitfield remembered hearing a female yell. Mr. Whitfield took off running because he "didn't wanna be in the way of what was coming out that door." As he was running, Mr. Whitfield noticed that the defendant was not far behind him, and they left the apartment complex the same way they entered. The defendant drove Mr. Whitfield back to Mr. Miles' house.

Mr. Whitfield testified that he asked the defendant what had happened, but the defendant did not say anything. Mr. Whitfield did not see the defendant with a gun until they were running from the apartment. The next day, Mr. Whitfield and his girlfriend went to Memphis for the holidays. While in Memphis, Mr. Whitfield saw on the news that two people had been shot and killed in a

Nashville apartment. Mr. Whitfield said that he did not call the police because he was scared that he might get charged along with the defendant.

Mr. Whitfield stated that Mr. Miles called him to say that the defendant was looking for him, but Mr. Miles did not give the defendant Mr. Whitfield's phone number. Mr. Whitfield was contacted by the police through his ex-girlfriend, and he gave a statement on January 30, 2004. In his first interview, Mr. Whitfield told the detective that he "didn't want no part of it." Mr. Whitfield talked to the detective again the next day and admitted that he was present, but did not tell the detective about the gun. Mr. Whitfield admitted that he testified at a hearing and did not mention seeing the defendant with a gun. Mr. Whitfield acknowledged that he had two prior felony drug convictions.

On cross-examination, Mr. Whitfield said that prior to this incident he did not hang out with the defendant. Mr. Whitfield stated that he never showed the police the hole in the fence he and the defendant went through the night of the incident. Mr. Whitfield admitted again that he initially told the police that he did not go with the defendant to Falon's apartment. Mr. Whitfield also admitted that during the second interview he did not mention seeing the defendant with a gun. Mr. Whitfield did not remember telling the police in his second interview that he went to his girlfriend's house and then met the defendant at a grocery store before heading to Falon's apartment.

When asked to recall his testimony at the preliminary hearing, Mr. Whitfield said that he was asked at what point he saw the defendant with a gun, and he responded, "[a]fter we left. After we struck out running." Mr. Whitfield was shown a transcript of his preliminary hearing testimony where he said that he never saw the defendant with a gun, even after he came out of the apartment. Mr. Whitfield admitted that he did not tell the truth during his two interviews with police or at the preliminary hearing.

Magan Glaze, Falon's sister, testified that the defendant and her sister dated for five years and then broke up in November 2003. Falon became involved with Terrance Scruggs while Falon was still dating the defendant. Magan talked to her sister on the phone between 10:30 and 11:00 p.m. the night she was killed. Magan said that while she was on the phone with her sister, she received a call from the defendant and a man named Joe who were looking for her sister. Magan recalled an incident about a week before Falon's murder when Falon showed up at her house and said that the defendant had just put a knife to her throat and threatened to kill her, her family, and her new boyfriend. On cross-examination, Magan admitted that she was not present when the defendant threatened Falon.

John Bostic testified that he lived in an apartment across the hall from Falon. Mr. Bostic noticed that Falon had a regular male visitor and then in December 2003 started having another male visitor. Mr. Bostic noted that he would still see the first male hanging around the parking lot of the apartment complex. Mr. Bostic recalled that around 11:00 p.m. on December 23, 2003, he heard a loud bang like something getting kicked in, and then a shot and muffled scream. Mr. Bostic then heard a second shot, another muffled scream, and footsteps running down the steps. On cross-

examination, Mr. Bostic admitted that he never saw who was involved in the altercation across the hall. Mr. Bostic also admitted that he told Detective Freeman that he thought he heard a car squealing as it pulled away.

Glenn Carter, owner of Carter's Family Florist, testified that the defendant ordered a half-dozen roses around Christmas 2003. The defendant told Mr. Carter that he had messed up and was trying to get his girl back. The defendant later called Mr. Carter and told him that he did not think the flowers had worked. On cross-examination, Mr. Carter acknowledged that it was not unusual for a man to send flowers to his girlfriend.

Medical Examiner, Dr. Tom Deering, testified that he performed the autopsies on the victims and determined that Falon died from a gunshot wound to the chest and Mr. Scruggs died from a gunshot wound to the back. Dr. Deering determined that Falon died within minutes of being shot, but Mr. Scruggs would have survived longer. On cross-examination, Dr. Deering stated that he could not determine which victim was shot first, nor could he determine how close the shooter was to either victim.

Metropolitan Nashville Police Detective Charles Freeman testified that Falon's family pointed to the defendant as a suspect from the beginning. On December 24, 2003, Detective Freeman went to the defendant's house and asked him to come to the police station. The defendant told Detective Freeman that the previous night he had been in class until 8:00 p.m. and rode the bus home where he was the rest of the night. Later, the defendant told Detective Freeman that he had actually received a ride home from a girl in another class. When asked a third time, the defendant said that he had driven home from class but did not want to tell because he was not supposed to be driving. Detective Freeman recalled that he received information from a Mr. Grimes that caused him to question the defendant again. This time the defendant stated that he went to Mr. Grimes' house around 12:30 a.m. the morning of December 24th, and then Mr. Grimes gave him a ride home.

Detective Freeman testified that he received information from Mr. Whitfield about how he and the defendant got into the apartment complex, and he located and videotaped the path they had taken. Detective Freeman noted that there was a hole in the fence through which one could enter into the apartment complex. Detective Freeman said that he never located any suspects other than the defendant.

On cross-examination, Detective Freeman stated that he never asked Mr. Whitfield to accompany him to the scene of the crime and show him the route they took that night. Detective Freeman also stated that he went to the scene and looked for the hole in the fence shortly after interviewing Mr. Whitfield, but was unable to locate the hole. Detective Freeman said that he was able to find the hole in the fence in September 2005 when he went to make the videotape. Detective Freeman admitted that no physical evidence was collected that would place the defendant at the scene of the shootings. Detective Freeman acknowledged that if a person went into an apartment, closed the door, and fired a pistol, the shell casings would not have been outside the door and in the door frame.

Following the conclusion of the proof, the jury found the defendant guilty of the second degree murder of Terrance Scruggs and the first degree murder of Falon Glaze. The trial court imposed a mandatory life sentence for the first degree murder conviction and set a sentencing hearing for the second degree murder conviction.

## **II. ANALYSIS**

On appeal, the defendant raises five issues for our review. He argues that the trial court erred: (1) in not allowing a complete jury voir dire; (2) in allowing testimony regarding his conduct toward the victim in violation of the rule against hearsay and Tennessee Rule of Evidence 404(b); (3) in excluding a video of a witness's prior inconsistent statement; (4) in not acting as thirteenth juror because the jury verdict was against the weight of the evidence; and (5) in its sentencing determination. We will address each issue in turn.

### **A. Jury Voir Dire**

The defendant argues that the trial court erred in not allowing him to completely voir dire the jury as to the "levels of proof," thus denying him the right to a fair and impartial jury.

During voir dire, defense counsel addressed the jury regarding the levels of proof in civil and criminal proceedings. Defense counsel brought a chart before the jury and began to discuss "what the level of proofs are and the different issues in different cases." In response to a question by defense counsel, one juror stated that he thought the burden of proof should be the same in civil and criminal cases. Defense counsel then attempted to clarify the issue with a hypothetical, and the state objected. The court interceded by providing a clear explanation of what "proof beyond a reasonable doubt" means. The court said:

All right. Let me tell the Jury that there's a difference between a civil case, which is by a preponderance of the evidence, and this particular case, which would be proof beyond a reasonable doubt.

. . . .

[I will] explain to you now what "proof beyond a reasonable doubt" means; and then we can move on with this, there won't be any differences about what the State has to prove.

This would be the instruction that I will give you, at the end of the case; but it says, "Reasonable doubt does not mean a doubt that may arise from possibility.["]

"What it does mean is, after looking at all the evidence and the law, there is an inability on your part, after such investigation, to let the mind rest easily as to the certainty of guilt.["]

“Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, as to every element of the offense.”

So, that is what “beyond a reasonable doubt” means.

A civil standard, which is beyond a -- I mean, which is by a preponderance of the evidence, just means that a fifty percent plus zero-zero-one, you know, just a little bit more, then the person in a civil case would get a monetary judgment, if the plaintiff had proven that by a preponderance of the evidence.

But that is not the standard in this case, and I’ve already explained to you what the standard is.

Defense counsel asked a few more questions to insure the jurors understood the state’s burden of proof. The record reveals no objection by defense counsel to the trial court’s explanation of the burden of proof to the prospective jurors.

The ultimate goal of voir dire is to ensure that jurors are competent, unbiased, and impartial. *State v. Howell*, 868 S.W.2d 238, 247 (Tenn. 1993). “The scope and extent of voir dire is entrusted to the discretion of the trial judge, and his actions will not be disturbed unless clear abuse of discretion is shown.” *State v. Harris*, 839 S.W.2d 54, 65 (Tenn. 1992).

Upon review, we note that while the defendant did raise this issue in his motion for new trial, he failed to raise a contemporaneous objection at trial and has therefore waived consideration of this issue. *See* Tenn. R. App. P. 36(a). Notwithstanding waiver, we conclude that the trial court acted within the bounds of its discretion in its conduct of voir dire. The transcript reveals that the trial court did not “cut off” defense counsel’s questioning of prospective jurors, but instead, assisted defense counsel in insuring the jury had a proper understanding of the applicable burden of proof. After providing an explanation of the law, the trial court encouraged defense counsel to ask the jury about whether it could follow the court’s instruction. In sum, the record does not support the defendant’s assertion that he was not allowed to adequately voir dire the prospective jurors regarding the “levels of proof,” nor does the record show that the defendant was denied the right to a fair and impartial jury. The defendant is not entitled to relief on this issue.

### **B. Testimony Regarding Prior Misconduct**

The defendant argues that the trial court erred in allowing the testimony of Etasha Ford and Magan Glaze regarding prior attempts by the defendant to harm Falon Glaze. The defendant argues that this testimony was both hearsay and improper character evidence.

Prior to trial, the court conducted a hearing in accordance with Tennessee Rule of Evidence 404(b). At the hearing, Magan testified that a week before Falon’s death, Falon showed up at her house with a shocked, weird look on her face. Falon told Magan that the defendant had just tried to kill her. Falon related the course of events that had just taken place, culminating in the defendant

putting a knife to her neck and saying that he was going to kill her and everybody at her grandmother's house – including her new boyfriend. Magan admitted that she did not witness the incident. Magan also recalled that the Sunday prior to Falon's death, Falon received flowers from the defendant apologizing for something. Magan noted that a tire on Falon's car had been slashed that weekend.

Etasha Ford also testified at the hearing. Ms. Ford recalled an incident in April 2003 when Falon called her "screaming and hollering" that the defendant had just tried to kill her by running her car off the road. Ms. Ford later saw the damage to Falon's car, and it appeared to have been sideswiped. Ms. Ford also recalled that about a week prior to Falon's death, Falon called her and said that the defendant had just put a knife to her neck and threatened to kill her, her boyfriend, and "everybody in the house." Ms. Ford noted that Falon was panicking and breathing fast. Ms. Ford stated that the Sunday before Falon's death, the tires on Falon's car appeared to have been cut or had the air let out. Ms. Ford admitted that she did not personally witness the incidents.

The trial court determined that the witnesses would be allowed to testify regarding Falon's statements, finding that the statements were non-testimonial excited utterances and therefore admissible as exceptions to the rule against hearsay. The court also found that Falon's statements were relevant to prove the defendant's identity as the perpetrator of the offense and probative of his motive and intent to harm Falon. The court determined that the high probative value of the other act evidence was not outweighed by the danger of unfair prejudice; therefore, the other act evidence was not precluded by Tennessee Rule of Evidence 404(b) as improper character evidence. The court concluded that testimony regarding Falon's car having flat tires was not admissible unless there was proof attributing the flat tires to the defendant.

### **1. Hearsay / Confrontation**

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). In general, hearsay statements are inadmissible. Tenn. R. Evid. 802 ("Hearsay is not admissible except as provided by these rules or otherwise by law."). However, the rules of evidence provide an exception to the hearsay rule allowing hearsay statements to be admissible if they meet the conditions of an "excited utterance." Tenn. R. Evid. 803(2). An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.* The rationale for admitting an "excited utterance" is that the perceived event produces nervous excitement, which temporarily suspends the capacity to reflect, making the fabrication of statements about that event unlikely. *State v. Gordon*, 952 S.W.2d 817, 819 (Tenn. 1997) (citations omitted). In addition, a statement relating to a startling event is typically made while the memory of the circumstance or event is still fresh, thus creating a more accurate testimonial to the event than would be produced by a later in-court description of it. *Id.* at 819-20.

In order to meet the parameters of the "excited utterance" exception (1) there must be a startling event or condition that causes the stress of excitement; (2) the statement must relate to the startling event or condition; and (3) the statement must be made while the declarant was under the

stress or excitement of the event or condition. *State v. Stout*, 46 S.W.3d 689, 699-700 (Tenn. 2001), *superseded by statute on other grounds as stated in State v. Odom*, 137 S.W.3d 572 (Tenn. 2004); *Gordon*, 952 S.W.2d at 820. It is reasonable to infer that getting sideswiped while driving and having a knife put to one's neck are exciting or startling events. It is clear that both of Falon's statements relate to the startling events. From Magan and Ms. Ford's testimony at the hearing and trial, it is also clear that Falon made both statements soon after being put in fear for her life. While the record does not reveal the time lapse between the incidents and the statements, both witnesses relayed that Falon seemed breathless, panicked, and shocked when she reported the respective events. Even though Falon's statement to Magan came in response to Magan asking "what's wrong," Magan's query was an innocuous question brought on by Falon showing up at her door with "a weird look in her face, like something had just happened." In sum, we conclude that Falon's statements were made after a startling event, were related to the event, and were made while under the stress and excitement of the event. As such, the trial court properly admitted Falon's statements under the excited utterance exception to the rule against hearsay.

Even though we have determined that Falon's statements were properly considered as an exception to the rule against hearsay, the defendant nevertheless has the right to confront witnesses who present testimony against him under the Sixth Amendment to the United States Constitution. Although the defendant does not argue that his rights under the Confrontation Clause were violated by the admission of Falon's excited utterances, we address the possible confrontation implications below.

The Sixth Amendment to the United States Constitution provides the accused with the right to be confronted with witnesses against him. This constitutional guarantee is applied to the states via the Fourteenth Amendment. *See Pointer v. Texas*, 380 U.S. 400, 403 (1965). In addition, article I, section 9 of the Tennessee Constitution guarantees the accused the right "to meet the witnesses face to face."

The United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), overturned the previously well-settled rule of *Ohio v. Roberts*, 448 U.S. 56 (1980), and held that the Confrontation Clause prohibits the admission of testimonial hearsay against a criminal defendant without a showing that the witness who made the statement is unavailable, and that the defendant had a prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 68. According to *Crawford*, proper Sixth Amendment Confrontation Clause analysis turns on whether a particular statement is testimonial or non-testimonial in nature. *Id.* The Court noted that where non-testimonial hearsay is involved, the Confrontation Clause is not implicated and the states are free to determine whether the statement is admissible under its own hearsay law. *Id.* Therefore, we must determine whether Falon's excited utterances to her cousin and sister were testimonial or non-testimonial in nature.

Recently, in *State v. Maclin*, 183 S.W.3d 335 (Tenn. 2006), the Tennessee Supreme Court held that "the language of *Crawford* points to an objective standard-that is, whether the statement was made under circumstances which would lead an objective witness reasonably to believe that the

statement would be available for use at a later trial.” *Id.* at 349 (citation and internal quotations omitted). In determining whether an excited utterance is testimonial or non-testimonial, the *Maclin* court adopted a totality of the circumstances approach with the primary consideration being “whether the declarant was acting as a ‘witness’-that is, ‘bearing testimony’ against the accused.” *Id.* at 351. Following *Crawford*, the *Maclin* court defined testimony as: “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Id.* The *Maclin* court then noted that if a court concludes a statement is non-testimonial, the court must, consistent with *Ohio v. Roberts*, also determine whether the out-of-court statement falls within a “firmly rooted hearsay exception” or bears “particularized guarantees of trustworthiness.” *Id.* (quoting *Roberts*, 448 U.S. at 66).

In this case, we conclude that Falon’s statements to her cousin and sister were non-testimonial in nature. An objective witness would not reasonably believe that Falon’s statements were made when she was acting as a witness against the defendant, or made for use in a future legal proceeding. Instead, Falon was voicing her concerns to members of her family relating that the defendant had just tried to hurt her.

Having concluded that Falon’s statements to her sister and cousin were non-testimonial in nature, we must now analyze her out-of-court statements under the framework set out in *Ohio v. Roberts*. *Id.* As we determined above, Falon’s statements were properly admitted as excited utterances. Both the United States Supreme Court and the Tennessee Supreme Court have held that the excited utterance exception to the rule against hearsay is “firmly rooted.” See *White v. Illinois*, 502 U.S. 346, 355 n.8 (1992); *Maclin*, 183 S.W.3d at 353. Accordingly, the defendant’s confrontation rights were not violated by the admission of the non-testimonial excited utterances of victim Falon Glaze.

## **2. Character Evidence**

The Tennessee Rules of Evidence provide that all “relevant evidence is admissible” unless excluded by other evidentiary rules or applicable authority. Tenn. R. Evid. 402. Of course, “[e]vidence which is not relevant is not admissible.” *Id.* Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Id.* at 401. However, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Id.* at 403.

Evidence of a defendant’s character offered for the purpose of proving that the defendant acted in conformity with that character is not admissible. *Id.* at 404(a). Additionally, evidence of other crimes, wrongs, or bad acts is not admissible to prove the character of a person to show action in conformity with that character. *Id.* at 404(b). Such evidence may be admissible, however, for “other purposes” if the following conditions are met:

- (1) The court upon request must hold a hearing outside the jury’s presence;

- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
- (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
- (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

*Id.* Our supreme court has determined that such “other purposes” includes demonstrating identity, motive, or intent. *State v. Berry*, 141 S.W.3d 549, 582 (Tenn. 2004). When a trial court substantially complies with the procedural requirements of the rule, its determination will not be overturned absent an abuse of discretion. *State v. James*, 81 S.W.3d 751, 759 (Tenn. 2002); *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997). When attempting to exclude otherwise admissible and relevant evidence, the individual seeking exclusion bears a “significant burden of persuasion.” *James*, 81 S.W.3d at 757-58.

Upon review, we discern no abuse of discretion in the trial court allowing testimony from Magan Glaze and Etasha Ford regarding prior violent acts of the defendant toward Falon Glaze. Evidence of the defendant running Falon off the road in April 2003 and putting a knife to her neck and threatening her life a week prior to her murder was admitted not to prove the defendant acted in accord with his character but as part of the proof establishing that he was a jaded ex-boyfriend. The previous “violent acts indicating the relationship between the victim of a violent crime and the defendant prior to the commission of the offense are relevant to show defendant’s hostility toward the victim, malice, intent, and a settled purpose to harm the victim.” *State v. Smith*, 868 S.W.2d 561, 574 (Tenn. 1993). As found by the trial court, the probative value of this evidence is not outweighed by the danger of unfair prejudice. *See* Tenn. R. Evid. 404(b)(4). The defendant is not entitled to relief on this issue.

### **C. Videotaped Inconsistent Statement**

The defendant argues that the trial court erred in preventing him from introducing the videotaped prior inconsistent statements of the state’s witness Joseph Whitfield. He argues that he was “denied his right of confrontation by [not] being allowed complete cross-examination of the witness.”

At trial, Mr. Whitfield testified that he went to Falon Glaze’s apartment with the defendant and saw the defendant break down the door and go inside. He also testified that he heard two shots and a woman’s voice before the defendant came back out bearing a handgun. On cross-examination, defense counsel asked Mr. Whitfield about statements he made to the police during his two interrogations and statements made during the preliminary hearing. Mr. Whitfield admitted that he initially told the police that he did not go with the defendant to Falon’s apartment that night. Later, defense counsel questioned Mr. Whitfield about his current testimony that he saw the defendant in

the possession of a gun when they were leaving the crime scene but had said nothing about seeing a gun before. Mr. Whitfield initially responded that he had told the officers he did not see the defendant with a gun on the way to the apartment, and the officers had not asked him if he saw a gun when the defendant was leaving the apartment. However, defense counsel confronted Mr. Whitfield with a transcript from the preliminary hearing where Mr. Whitfield said he did not see a gun, and Mr. Whitfield admitted that his preliminary hearing testimony was not the same as his current testimony. Mr. Whitfield subsequently admitted that he told the police in January 2004 that he was not involved in the incident, told the police in February 2004 that he did not see a gun, and testified at the preliminary hearing that he did not see a gun, which was all contrary to his testimony at trial. Defense counsel then sought to play the videotape of Mr. Whitfield's statements to the police. The trial court hesitated to allow the tape to be played because the court was "not sure there's anything to contradict" and said that defense counsel may want to clarify Mr. Whitfield's testimony. Defense counsel asked a few follow-up questions and made no further attempt to introduce the tape.

The credibility of a witness may be attacked by any party. Tenn. R. Evid. 607. Prior inconsistent statements may be used to impeach the credibility of a witness. *Id.* at 613. However, extrinsic evidence of a prior inconsistent statement of a witness is inadmissible unless the "witness either denies or equivocates as to having made the prior inconsistent statement." *See State v. Martin*, 964 S.W.2d 564, 567 (Tenn. 1998); *see also* Tenn. R. Evid. 613(b).

In this case, the record demonstrates that Mr. Whitfield was asked about his two statements to the police and his testimony at the preliminary hearing, and Mr. Whitfield admitted that his trial testimony differed from his previous accounts. The defendant's assertion that he was "denied his right of confrontation by [not] being allowed complete cross-examination of the witness" is without merit because the record clearly indicates that the defendant was allowed to fully cross-examine Mr. Whitfield regarding his various recollections of the incident. Just as observed by the trial court, Mr. Whitfield did not deny the inconsistencies in his statements, therefore the introduction of extrinsic evidence would have been cumulative and not necessary. The defendant is not entitled to relief on this issue.

#### **D. Verdict Against Weight of Evidence**

The defendant argues that the jury verdict was against the weight of the evidence; and therefore, the trial court did not properly serve in its role as the thirteenth juror. Specifically, he argues that there was nothing to connect him to the murders, and Mr. Whitfield's testimony was inconsistent with the physical evidence.

We begin our review with the defendant's claim that the verdict was contrary to the weight of the evidence, or in other words, that the trial court should not have accepted the jury's verdict in performing its role as thirteenth juror. Rule 33(f) of the Tennessee Rules of Criminal Procedure imposes a duty on the trial court to serve as the thirteenth juror. *State v. Carter*, 896 S.W.2d 119, 122 (Tenn. 1995). If the trial court disagrees with the jury about the weight of the evidence, Rule 33(f) authorizes the trial court to grant a new trial. Tenn. R. Crim. P. 33(f). The trial court is not required to make an explicit statement on the record, but instead, when the trial court simply

overrules a motion for new trial, this court may presume that the trial court has served as the thirteenth juror and approved the jury's verdict. *State v. Moats*, 906 S.W.2d 431, 434 (Tenn. 1995). Only if the record contains statements by the trial court indicating disagreement or dissatisfaction with the jury's verdict or evidencing the trial court's failure to act as the thirteenth juror may the reviewing court reverse the trial court's judgment. *Carter*, 896 S.W.2d at 122. Otherwise, our review is limited to a review of the sufficiency of the evidence. *State v. Burlison*, 868 S.W.2d 713, 718-19 (Tenn. Crim. App. 1993).

The record reveals that the trial court considered and overruled the defendant's motion for new trial, thus discharging its duty as the thirteenth juror. Therefore, our review is limited to a review of the sufficiency of the convicting evidence. *See id.* Upon review, we reiterate the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to this court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003). In contrast, the jury's verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006). Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

First degree premeditated murder is statutorily defined as "[a] premeditated and intentional killing of another." Tenn. Code Ann. § 39-13-202(a)(1). An act is premeditated if the act is "done after the exercise of reflection and judgment." *Id.* § 39-13-202(d). In other words, the "intent to kill" must have been formed prior to the act of murder itself, and the accused must be sufficiently free from excitement and passion. *Id.* Whether premeditation is present is a question of fact for the jury, and it may be determined from the circumstances surrounding the offense. *Bland*, 958 S.W.2d at 660; *State v. Anderson*, 835 S.W.2d 600, 605 (Tenn. Crim. App. 1992). In particular, declarations by the defendant of an intent to kill and the use of a deadly weapon upon an unarmed victim are evidence of premeditation. *See Bland*, 958 S.W.2d at 660. The establishment of the motive for the killing is another factor from which the trier of fact may infer premeditation. *State v. Leach*, 148 S.W.3d 42, 54 (Tenn. 2004).

Second degree murder is the “knowing killing of another.” Tenn. Code Ann. § 39-13-210. A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result. *Id.* § 39-11-106(a)(20). The identity of the offender is an essential element of any crime. *Rice*, 184 S.W.3d at 662 (citing *State v. Thompson*, 519 S.W.2d 789, 793 (Tenn. 1975)).

In this case, we conclude that the direct and circumstantial evidence presented at trial was sufficient to support the defendant’s convictions. Taken in the light most favorable to the state, the evidence shows that the defendant gained access to Falon’s apartment through a hole in the perimeter fence. The defendant “made his way” inside the apartment, after which, two gunshots sounded and a woman screamed. The defendant had a gun when he left the apartment. Magan Glaze talked to her sister on the phone between 10:30 and 11:00 p.m. the night she was killed, and while she was on the phone with her sister, Magan received a call from the defendant and a man named Joe who were looking for her sister. During his investigation, Officer Freeman located a hole in the fence, and the other officers noticed that Falon’s apartment door jamb was “busted”.

Mr. Whitfield’s testimony directly linked the defendant to the murders, and Etasha Ford and Magan’s testimony revealed that the defendant had previously made threats and violent attacks on Falon Glaze. While Mr. Whitfield’s testimony was shown to be inconsistent with his previous statements, Mr. Whitfield was thoroughly cross-examined at trial and the jury was able to assess his credibility.

The defendant argues that the placement of the shell casings at the scene discredits Mr. Whitfield’s testimony that the apartment door was shut when the shooting occurred. However, it is possible that the evidence was moved from its original location when the defendant exited the apartment. It is also possible that the evidence was moved before Officer Johnson noted the location of the casings. Again, all factual issues raised by the evidence were resolved by the jury as the trier of fact. *Bland*, 958 S.W.2d at 659. We will not second-guess the determinations made by the jury.

We conclude that the defendant has failed to prove that no rational trier of fact could have found him guilty of first and second degree murder beyond a reasonable doubt. Accordingly, the defendant is not entitled to relief on this issue.

### **E. Sentencing**

The defendant argues that the trial court erred in enhancing his sentence based on enhancement factors not presented by the district attorney and in ordering that his sentences be served consecutively.

This court’s review of a challenged sentence is a de novo review of the record with a presumption that the trial court’s determinations are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*,

986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

In conducting our de novo review, this court must consider (a) the evidence adduced at trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing; (d) the arguments of counsel as to sentencing alternatives; (e) the nature and characteristics of the offense; (f) the enhancement and mitigating factors; and (g) the defendant's potential or lack of potential for rehabilitation or treatment. *Id.* §§ 40-35-103(5), -210(b).

### **1. Enhancement Factors**

The defendant argues that the trial court erred in enhancing his sentence based on enhancement factors not argued by the district attorney. Relying on the pre-sentence report, the trial court enhanced the defendant's sentence based on his previous history of criminal convictions and criminal behavior, and his unwillingness to comply with release conditions. *See* Tenn. Code Ann. § 40-35-114(1), (8). The trial court noted that the pre-sentence report also showed that the defendant was placed on probation after one year of confinement on a conviction dated November 29, 2001, and therefore, the obvious conclusion was that the defendant was on probation at the time he committed the murders in this case. However, the court declined to enhance the defendant's sentence based on his commission of a felony while on probation, *see id.* § 40-35-114(13), because there was no proof as to the defendant's official status. The court placed great weight on the two enhancement factors and did not find any mitigating factors. The court then sentenced the defendant to thirty-two years for the second degree murder of Terrance Scruggs.

The defendant asserts that the "court took it upon itself [to] find enhancing factors of an extensive criminal record, failure to comply with conditions of parole or probation, and an offense committed while on probation." The defendant, however, failed to cite to any authority for his assertion that the trial court is prohibited from examining the record for applicable enhancement or mitigating factors if neither party suggests such factors. We note that the state is required to provide notice of its intention to classify a defendant as a multiple, persistent, or career offender. Tenn. Code Ann. § 40-35-202(a). However, there is no statutory mandate for the state to provide notice of enhancement factors. *See State v. Bobby Joe Strader*, No. 03C01-9812-CR-00425, 1999 WL 1023738, at \*3 (Tenn. Crim. App., at Knoxville, Nov. 10, 1999); *State v. Robert Lee Norris*, No. 01C01-9603-CC-00088, 1997 WL 42999, at \*2 (Tenn. Crim. App., at Nashville, Jan. 30, 1997), *perm. app. denied* (Tenn. June 30, 1997). Whether notice of potential enhancement factors is required to be filed is within the discretion of the trial court. Tenn. Code Ann. § 40-35-202(b)(1). However, the trial court is not bound by the state's recommendations or limited to only those factors presented by the state. *See State v. Albert Franklin*, No. 02C-01-9404-CR-00081, 1994 WL 697928, at \*1 (Tenn. Crim. App., at Jackson, Dec. 14, 1994). "The court may apply any enhancement factor

that is supported by the evidence at the trial, the sentencing hearing, or the pre-sentence report.” *Id.*

Upon review, we conclude that the defendant is not entitled to relief on this issue. Here, the defendant’s pre-sentence report was admitted into evidence without objection, and the report clearly details the defendant’s criminal history including three felony drug offenses, two misdemeanor assault offenses, a weapons offense, and an evading arrest offense. The pre-sentence report also notes that the defendant’s “record contains multiple probation violations and revocations,” which is indicative of his unwillingness to comply with release conditions. Accordingly, the trial court did not abuse its discretion in enhancing the defendant’s sentence.

## **2. Consecutive Sentencing**

The defendant also argues that the trial court erred in ordering that his sentences be served consecutively. Prior to sentencing, the state filed a motion for consecutive sentencing based on two factors: the defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood, and the defendant is an offender whose record of criminal activity is extensive.

The trial court determined that the two factors offered by the state were appropriate. Regarding the defendant’s status as a professional criminal, the defendant argued that there was insufficient proof, but the court found as follows:

I understand [defense counsel’s] position about there being the need for additional proof, as to a person being qualified as a professional criminal . . . other than just convictions -- but I think that is present here in this case, when you have convictions for selling cocaine in June of ‘ninety-eight, selling cocaine in June of ‘ninety-nine, selling cocaine in November of two-thousand-one, and the acknowledgment within the pre-sentence report that it has been a long time since he worked anywhere and that he doesn’t use controlled substances, he just sells them.

The court then noted that the defendant’s extensive record of criminal activity was an even greater justification for sentencing the defendant consecutively. The court further noted that the defendant had convictions for selling drugs, possession of weapons, assault, and evading arrest. The court also indicated that the defendant was a dangerous offender whose behavior indicates little or no regard for human life when the risk to human life is high.

When a defendant is convicted of more than one criminal offense, the trial court may order the sentences to run concurrently or consecutively as guided by Tennessee Code Annotated section 40-35-115. Pursuant to this code section, a trial court may order consecutive sentencing if any of the following criteria are found by a preponderance of the evidence:

- (1) The defendant is a professional criminal who has knowingly devoted such defendant’s life to criminal acts as a major source of livelihood;

- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- (6) The defendant is sentenced for an offense committed while on probation; or
- (7) The defendant is sentenced for criminal contempt.

*Id.* § 40-35-115(b). If the trial court finds that the defendant is a “dangerous offender,” it must also determine whether the consecutive sentences are reasonably related to the severity of the offenses and serve to protect the public from further criminal conduct by the offender. *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995).

We note that the trial court cited *Wilkerson* and essentially found that consecutive sentences were reasonably related to the seriousness of the offense in noting that one life sentence for two murders did not seem appropriate. However, the trial court failed to make a specific finding regarding whether consecutive sentences were necessary to protect the public from further criminal activity. Nevertheless, even without a proper finding by the trial court that the defendant was a dangerous offender, the defendant's extensive criminal history beginning at the age of nineteen, and his status as a professional criminal, both discussed by the trial court, justify consecutive sentencing. Accordingly, the trial court did not abuse its discretion in ordering that the defendant serve his sentences consecutively.

### **III. CONCLUSION**

Based on the above mentioned reasoning and authorities, we affirm the judgments of the Davidson County Criminal Court.

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J.C. McLIN, JUDGE